IN THE SUPREME COURT OF OHIO
CASE NO. 2007-0558

ON APPEAL FROM THE COURT OF APPEALS
SEVENTH APPELLATE DISTRICT
MAHONING COUNTY, OHIO
CASE NO. 04-MA-182

SHARON WILBORN, ET AL.,
PLAINTIFFS-APPELLANTS,
V.
BANK ONE CORPORATION, ET AL.,
DEFENDANTS-APPELLEES.

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ARGUMENT

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

The most striking aspect of the Defendants-Appellees' briefs to this Court is their contention that Plaintiffs-Appellants, including their *amici*, are seeking to have this Court establish a "new" rule of law that will "break new ground." As shown in the Plaintiffs-Appellants' initial brief, however, the Plaintiffs-Appellants' position is grounded in a salutary Ohio rule of law that has been in effect for over a century and a half, as exemplified by such cases as *Miller v. Kyle* (1911), 85 Ohio St. 186, and *State v. Taylor* (1841), 10 Ohio 378, and the public policy considerations upon which those cases were based, including the tendency of such provisions to encourage litigation.[1]

No less striking is the manner in which Defendants-Appellees' downplay the many *amici* that have supported Plaintiffs-Appellants' here, from the State of Ohio itself to the broad swath of groups who see, every day, the effect of thousands and thousands of dollars of attorneys' fees being levied on Ohioans facing foreclosure who are trying to save their homes. Further, the Defendants-Appellees' and their *amici* make repeated statements of "fact" without any evidentiary basis whatsoever – such as their contention that economic necessity requires that they be able to charge many thousands of dollars of attorney fees for reinstatements, which ignores that the many other ways that lenders can recoup their costs spread risk. Moreover, to argue that this Court should ignore the *amicus* briefs filed in favor of the Plaintiffs-Appellants by those groups who most help the disadvantaged in Ohio – particularly ignore those briefs in this day and age – is insupportable. This case presents the timely and significant issue of law

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[1] Consistent with their attempt to rewrite the history of Ohio's common law, Defendants-Appellees also attempt to rewrite what is at issue here by submitting their own proposition of law. The Defendants-Appellees' submitted proposition of law misses the point. At issue in this case is an attempt to collect attorneys' fees *upon a default*.

whether the long-standing Ohio rule invalidating attorney fee provisions in contracts of indebtedness– a rule that provides, and would continue to provide, salutary benefits to Ohioans now in the most dire of straits – will continue to be upheld by this Court.

Below, we address the specific legal points raised by Defendants-Appellees.

II. REPLY TO "MERIT BRIEF OF DEFENDANTS-APPELLEES BANK ONE, N.A. (OHIO), ET AL."

A. The Defendants-Appellees Are Seeking To Enforce An Attorney Fee Provision Payable Upon Default In A Contract Of Indebtedness

The Defendants-Appellees, consistent with their arguments in the lower courts, seek to have this Court base its decision on the fiction that the provision in the mortgage contract requiring the borrower to pay the lender's attorney fees as a condition of reinstatement is somehow unrelated to the alleged default or the enforcement of a contract of indebtedness, *i.e.*, the foreclosure of a mortgage:

> Reinstatement clauses ... are invoked only at the option of the defaulting borrower, **outside of foreclosure proceedings**....
>
> * * *
>
> *** Plaintiffs' assertions [also] disregard the actual context and objective of the parties' transaction, which takes place **outside of formal foreclosure proceedings**....

Defendants-Appellees' Brief, pp. 3 and 28-29.

It should first be noted that the common law rule re-affirmed in *Miller* was never limited to the assessment of attorney fees in formal foreclosure proceedings. This Court in *Miller* instead held that "[t]he policy of the state of Ohio from the beginning has been that [an attorney fee] provision in a note or mortgage is against public policy, and void," and that, "[w]hatever

was the reasoning which may be argued pro and con upon this question, the policy of the state of Ohio then and there became well settled."[2]

The crux of the *Miller* Court's ruling is that attorney fee provisions in contracts of indebtedness that become effective "*upon default*" – not just after judgment – are not enforceable because such provisions are contrary to public policy. 85 Ohio St. at 192. This conclusion, the Court held, "is well sustained by the obvious tendency of such contracts to encourage suits."

Defendants-Appellees' argument, as demonstrated in the Plaintiffs-Appellants' opening brief, not only ignores the "upon default" language in *Miller*, but also ignores the fact that the contractual provision requiring the payment of attorney fees expressly applies **only** after an alleged default and in the context of a foreclosure action that has already been commenced, and states that the borrower has the "right to have **enforcement** of this Security Instrument discontinued...." *See* typical reinstatement provision quoted at ¶¶ 4-5 of the Court of Appeals Opinion, and Supplement, p. 106 (emphasis added). Accordingly, any assertion that the payment of attorney fees is unrelated or unconnected to the "default" or "enforcement" of a contract of indebtedness does not withstand scrutiny.

Most recently, a federal district court (Judge Watson), after setting forth the historical development of Ohio's common law, and this Court's decisions in *Worth v. Aetna Cas. & Surety Co.* (1987), 32 Ohio St. 3d 238, and *Nottingdale Homeowner's Asso. v. Darby* (1987), 33 Ohio St. 3d 32, rejected a bank's argument that requiring borrowers to pay attorney fees to cure their defaults is somehow unrelated or unconnected to the default, such that Ohio's common law invalidating such clauses applied:

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[2] As demonstrated by the *Amicus* brief filed by the State of Ohio in this case today, the policy of the State of Ohio toward such attorney fee provision in mortgages has not changed in the intervening 165 years since *Taylor*.

> Chase argues that *Miller* is inapplicable because the fees became payable not as a penalty for default, but instead "as a condition of the Debtor's election to cure their defaults...."
>
> Review of the Mortgage's attorney fee provisions ... makes obvious that these provisions, like the provisions in *Miller*, are **default-based**, *i.e.*, the ... contractual obligation to pay attorney fees and costs was triggered by their default under the Mortgage.

Chase Manhattan Mort. Corp. v. Tudor (U.S. Dist. Ct., Southern Dist., December 7, 2007), Case No. 2:06cv26, 2007 U.S. Dist. LEXIS 90285 **15-16 (emphasis added).

The Defendants-Appellees nonetheless would have this Court evaluate this case as if the Plaintiffs-Appellants, out of the blue, voluntarily decided to contact their lenders, and then somehow induced them to resolve the default "outside of formal foreclosure proceedings." *See* Defendants-Appellees' Brief, p. 24 n.11. *See also* p. 5 ("each borrower voluntarily contacted his or her mortgage lender ... to resolve the dispute ... by means other than foreclosure litigation"). In fact, of course, the very reason there was contact between the lenders and borrowers herein is because the lenders, alleging the existence of defaults, had already filed foreclosure actions, leaving the Plaintiffs-Appellants with no choice but to accede to the Defendants-Appellees' demand that they pay the Defendants-Appellees' attorney fees – otherwise, they would lose their homes.

B. The Plaintiffs-Appellants Did Not Voluntarily Choose To Pay The Defendants-Appellees' Attorney Fees

The Defendants-Appellees would also have this Court base its decision on the fiction that a homeowner facing foreclosure voluntarily chooses or agrees to pay the lender's attorney fees:

> Plaintiffs ask this Court to break new ground and adopt a *per se* rule that would declare void ... any agreement providing that a borrower will pay a lender's reasonable attorneys' fees when the borrower **chooses to** enter into a mortgage reinstatement....

* * *

> [M]ost [of the] Plaintiffs **voluntarily agreed** to exercise a contractual right to reinstate their mortgages....

* * *

> *** Plaintiffs' argument ... disregards the **freedom that each borrower has to decide** to not work out a default on terms that include the payment of reasonable attorney fees and the essential, but-for role that each borrower plays in the transaction when he or she **voluntarily elects** to exercise right under the reinstatement clause....

Defendants-Appellees' Brief, pp. 1, 25 n.11 and 28. In fact, of course, a homeowner facing foreclosure has no real choice – he or she must either pay what the lender demands or lose his or her home – and the lender will demand, pursuant to the mortgage contract, that the homeowner pay its legal fees. If the homeowner responds that he or she does not want to agree to pay the attorney fees, the lender will respond that the homeowner already agreed to do so when he or she entered into the original mortgage contract.

C. There Is Only One Contract – The Mortgage – And It Is Adhesive

The Defendants-Appellees' argument in this regard also assumes that there are really two separately negotiated contracts – the original mortgage contract, and, then, a subsequent, separate "reinstatement" agreement that the Plaintiffs-Appellants voluntarily chose to enter into. In fact, of course, as the Defendants-Appellees have to acknowledge, it is the original mortgage contract that contains the provision which requires the payment of attorney fees:

> [Each] particular Plaintiff [herein] elected to exercise a contractual right to "reinstate" his or her mortgage loan, **according to the terms and conditions of the mortgage contract.... To reinstate a mortgage after default pursuant to such clauses, a borrower [must] pay ... the lender's reasonable attorneys' fees.**

Thus, the parties herein did not freely negotiate a new contract in which the borrower voluntarily agreed to pay the lender's attorney fees – the lenders instead required the borrowers to comply

with a provision in an existing mortgage contract that already required them to pay the lenders' attorney fees.

D. The Decision In *Nottingdale* Invalidates Attorney Fee Provisions In Adhesive Contracts

Although the Defendants-Appellees, in their discussion of the decision in *Nottingdale Homeowners' Assn., Inc. v. Darby* (1987), 33 Ohio St. 3d 32, 37 n.7, pay lip service to its holding that attorney fee provisions " in 'contracts of adhesion' that involved no 'realistic choice'" are unenforceable, they appear to argue that its holding has no real substance because, according to the Defendants-Appellees, the contract at issue in *Nottingdale* was also adhesive, yet the attorney fee provision was nonetheless enforced by this Court. *See* Defendants-Appellees' Brief, p. 20. This, of course, is an over simplistic analysis of the holding in *Nottingdale*. As shown in the Plaintiffs-Appellants' initial brief, this Court's decision in *Nottingdale* was based upon, and limited to, the unique facts of that case.[3]

The Defendants-Appellees' expansive characterization of the holding in *Nottingdale*, on the other hand, would endorse an attorney fee provision in **every** contract, because they argue that such provisions are permitted whenever a party has the initial choice to enter into a contract:

> *Nottingdale* ... recognize[s that] agreements to pay attorneys' fees may be enforceable in **any context** ... where party who agrees to pay the fees provision has the ability to accept or reject the contract.

[3] Plaintiffs-Appellants would note, in passing, that it does appear that some lower courts have interpreted *Nottingdale* as do the Defendants-Appellees herein, *i.e.*, as a broad endorsement of the enforceability of attorney fee provisions "in any context." Plaintiffs-Appellants submit that these cases go too far, and that this Court, by reversing the decision of the Court of Appeals in the instant case, will send a signal that Ohio has not adopted the English "loser pays" rule. It is also interesting to note that the dissent in *Nottingdale* foresaw the troublesome trend towards a "loser pays" rule that was engendered by this Court's holding in *Nottingdale*.

Defendants-Appellees' Brief, p. 23. In practice, of course, this statement of law would deem enforceable fee provisions in any and all contracts, or, to use the Defendants-Appellees' language, contracts entered into "in any context," because a party is always free to reject a contract. The Plaintiffs-Appellants, for example, were not forced at gunpoint to enter into the mortgage contracts at issue herein. Instead, as held by this Court in *Worth v. Aetna Cas. & Sur. Co.* (1987), 32 Ohio St. 3d 238, 242-43, which will be more fully discussed below, the issue is whether the party had the ability to bargain and negotiate over whether the contract should include an attorneys' fee provision. In the instant case, there is no dispute that the Plaintiffs-Appellants had no such power – they had to take the mortgage contracts as written on a take-it-or-leave-it basis, *i.e.*, they had to accept contracts that included attorney fee provisions.

E. The Attorney Fee Provision In The Mortgage Benefits Only The Lender, Not The Borrower

The Defendants-Appellees next attempt to convince this Court that the attorney fee provision is in the interests of both parties (the lender and the borrower), but, in so doing, they only talk about how the contractual provision allowing a borrower to "reinstate" a mortgage benefits both parties, not how the attorney fees provision benefits both parties. The reason for this failure is obvious – the attorney fee provision in no way benefits the Plaintiffs-Appellants.[4]

The Defendants-Appellees refer this Court to the holding in *Worth v. Aetna Cas. & Sur. Co.* (1987), 32 Ohio St. 3d 238, in support of its position that, when a contract benefits both

[4] Although the Defendants-Appellees claim that, if the attorney fee provision is invalidated, they will not offer reinstatements, such that the attorney fee provision is in both parties' interest, this argument proves too much. All parties to all contracts could claim that, if they are not allowed to include attorney fee provisions in their contracts, they will not make any contracts, such that, because both sides desire to make a contract, it is in the interest of both parties to have the attorney fee provision. If this "logic" controlled, this Court would hold, as argued by the Defendants-Appellees, that attorney fee contractual provisions are enforceable "in any context," and would thereby transform Ohio into a "loser pays" jurisdiction.

parties, an attorney fee provision is enforceable. In the first place, that case involved an indemnity contract, the very purpose of which was to provide for the payment of attorney fees. In that case, two senior executives were employed by Union Commerce Corporation, which was in negotiations with Huntington Bancshares to take control of Union Commerce. In order to induce those executives to stay on, even though they could be terminated by Huntington once it took over, Union Commerce entered into two year employment contracts providing for certain payments in the event that the executives were involuntarily terminated during the two year contract period.

Importantly, because the executives and Union Commerce anticipated that Huntington would repudiate these contracts,[5] and because the executives would then have to sue Huntington and incur legal fees to obtain the benefits afforded to them under the contract, Union Commerce agreed to pay the executives' legal fees in the event that Huntington took over Union Commerce, involuntarily terminated the executives, and refused to honor the contract:

> In order to ensure the benefits intended to be provided the executives under the Employment Agreements, without the executives' incurring costs of litigation, the agreements required Union Commerce ... to reimburse the executives for qualified legal fees....

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[5] The indemnity contract contained the following recital:

> "The Company [Union Commerce] is aware that [Huntington] may ... refuse to comply with its obligations under this Agreement.... In these circumstances, the purpose of this Agreement could be frustrated. It is the intent of the Company that Employee not be required to incur the expenses associated with the enforcement of his rights under this Agreement by litigation or other legal action because the cost and expense thereof would substantially detract from the benefits intended to be extended to Employee hereunder....

Worth, 32 Ohio St. 3d at p. 239.

Worth, 32 Ohio St. 3d at 238.

In enforcing the attorney fee provision in *Worth*, this Court distinguished indemnity contracts from contracts of indebtedness, such as the contract at issue here, and noted that the inclusion of the attorney fee provision in the employment contract (as distinguished from the employment contract itself) benefited both parties, and, most importantly, that the attorney fee provision was included as a result of "free and understanding negotiation," *i.e.*, that it was not an adhesive contract:

> In contrast, the indemnity agreements at issue in the instant case present a circumstance in which it is in the interest of both the executives and the employer for the executives to enforce the terms of their Employment Agreements. It was in the executives' interest to have the means to enforce their employment contracts. It was in Union Commerce's interest to retain qualified personnel during and following a change of control and to provide its executives with security by giving them the means to vindicate their rights under the contracts. **Through free and understanding negotiation, both the executives and the employer were able to protect their respective interests. The fact that this indemnity agreement was assented to in this context distinguishes this case from the ordinary stipulation to pay attorney fees for breach of a debt obligation.** This is not a situation of a one-sided attorney fees provision or one of imbalance, but one of making the indemnified parties whole. Consequently, our decision today leaves undisturbed our holding in *Miller v. Kyle, supra*, and like cases.

Worth, 32 Ohio St. 3d at pp. 242-243. No such factors exist in the context of the mortgage contracts at issue herein. Not even the Defendants-Appellants claim that the attorney fee provision resulted, as in *Worth*, from the "free and understanding negotiation" of the parties.

F. The Federal Courts Recognize The Limited Nature Of This Court's Holdings In *Nottingdale* and *Worth*

The Defendants-Appellees argue that the federal courts have recognized the "broad" nature of the holdings of this Court in *Worth* and *Nottingdale*. Most recently, however, a federal

district court (Judge Michael Watson), after carefully examining the holdings in *Nottingdale* and *Worth*, rejected the broad reading of those cases advocated by the Defendants-Appellees herein, and concluded that they instead stand for the proposition of law that attorney fee provisions are enforceable **only** when the parties had equal bargaining power, and the provision was the result of "free and understanding negotiation":

> In 1987, the Ohio Supreme Court decided two cases that qualified, but did not overturn the holding of *Miller*. [*Citing* to *Worth*, *supra* and *Nottingdale*, *supra*.]
>
> * * *
>
> **This Court ... interprets *Worth* and *Nottingdale* as carving out an exception to *Miller* when the parties have equal bargaining position, and the promise to pay attorneys' fees is arrived at through free and understanding negotiation.**
>
> * * *
>
> The policy implications of *Miller* apply equally here.
>
> * * *
>
> [T]his Court ... concludes that **the mortgage's default-based attorney fee provisions were not the product of free understanding and negotiation between parties of equal bargaining power and similar sophistication**. Accordingly, the Court holds that *Miller* is applicable and operates to void the mortgage's default-based attorney fee provisions.

Chase, **12-22 (emphasis added). It should be noted that, ultimately, the district court held that, despite its analysis of Ohio law, it did not need to actually decide if the attorney fee provision in the reinstatement clause was enforceable because the case involved a bankruptcy under Chapter 13: ("this Court need not decide [whether] contract stipulations requiring the payment of attorneys' fees as a condition of contractual reinstatement [are enforceable]"). *See Chase*, *29.

G. The Existence Of Federal Regulations, And Statutes In Other States, Which Allow The Recovery Of Attorney Fees, Shows That Ohio Does Not Allow The Recovery Of Attorney Fees

The Defendants-Appellees next argue that the attorney fee provisions in their mortgages should be enforced because various federal regulations allow a lender to require the borrower to pay legal fees upon a reinstatement. In the first place, the loans at issue herein are not subject to these federal regulations, and the issue before this Court is whether the attorney fee provisions are enforceable under Ohio law.[6] Moreover, as the Defendants-Appellees admit, these federal regulations resulted from an attempt to "balance the interests of borrowers and lenders." Defendants-Appellees' Brief, p. 32 n.14. Accordingly, in exchange for the right to seek the recovery of attorney fees, these federal regulations set limits on the ability of a lender to foreclose, and, importantly, also limit the amount of attorney fees that can be charged.[7]

The Defendants-Appellees also refer this Court to statutes from various other states that allow the recovery of attorney fees, but, again, the instant case involves Ohio law and, of course, if Ohio had such a statute, then such fees would be recoverable because this Court has held that Ohio law allows the recovery of attorney fees when a statute so provides. Moreover, as with the

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[6] The Defendants-Appellees, in the trial court, expressly indicated that they were not relying upon federal law in seeking the dismissal of the action. *See* Transcript of Proceedings in the Court of Common Pleas, p. 89 (Record Item No. 87).

[7] For example, 24 C.F.R. § 203.602 requires notice to a defaulting borrower; § 203.604 requires the lender to have a face-to-face meeting with the borrower before three payments are unpaid; and § 203.603 forbids a lender from filing for foreclosure until at least three monthly payments are unpaid, and requires the lender to give notice that it intends to foreclose if the default is not cured. Thus, this federal regulatory scheme represents a quid pro quod: In exchange for the limits on the lender's power to foreclose and the mandate that the lender work with the borrower to avoid foreclosure, the borrower may have to pay some of the lender's attorney fees if foreclosure nonetheless becomes necessary. *See also* Renuart, Williamson & Benson, FORECLOSURE PREVENTION COUNSELING – Preserving the American Dream, p. 175, which sets forth a chart listing the maximum amount of attorney fees that can be charged vis-à-vis the foreclosure of a HUD, Fannie Mae or Fannie Mae Mortgage. A copy is attached hereto at App. p. 1.

federal regulations to which they refer this Court, the Defendants-Appellees fail to recognize that these statutes not only give the lender the right to recover attorney fees, they also, like the federal regulatory scheme, set forth protections for the borrower. For example, the Defendants-Appellees refer the Court to California Civil Code § 2924c as allowing the recovery of attorney fees, but fail to note that division (d) of this statute places a limit on the amount of fees that may be charged: the statute only allows fees in the amount of $300.00 if the unpaid principal is $150,000.00 or less.

In any event, the fact that some other states have enacted statutes authorizing a lender to recover attorney fees actually supports the Plaintiffs-Appellants' position herein that, absent such statutory authority in Ohio, the lender may not charge attorney fees. The Defendants-Appellees implicitly recognize this fact, as shown by their argument that an Ohio statute, R.C. 1301.21, allows them to charge attorney fees. As will be shown below, this argument, like the rest of the Defendants-Appellees' arguments, is incorrect.

H. R.C. 1301.21 Invalidates Attorney Fee Provisions In Residential Mortgages

The Plaintiffs-Appellants have demonstrated that Ohio common law invalidates attorney fee provisions in contracts of indebtedness such as mortgages, and have acknowledged that the Ohio General Assembly, in enacting R.C. 1301.21, overturned that common law in limited circumstances, *i.e.*, when the contract of indebtedness is not for personal, family or household purposes, and when the amount of the indebtedness exceeds $100,000.00. Thus, the common law prohibition of attorney fee provisions in all consumer contracts of indebtedness, and even in business contracts of indebtedness for $100,000.00 or less, remains intact. The Defendants-Appellees, however, attempt to turn this argument on its head, and claim that the common law, as set forth in *Worth* and *Nottingdale*, allows attorney fee provisions in all contracts, including

contracts of indebtedness, and that this statute may not be read to overrule that common law. *See* Defendants-Appellees' Brief, pp. 38-39.

In the first place, as shown above, the Defendants-Appellees are incorrect in asserting that the common law allows the recovery of attorney fees in any and all contracts of indebtedness, so long as the borrower could have refused to have entered into the contract of indebtedness. Further, if they were correct that the common law allows attorney fee provisions in all contracts of indebtedness, then there would simply have been no reason for the Ohio General Assembly to enact a statute (R.C. § 1301.21) that allows such provisions *only* in some contracts of indebtedness, *i.e.*, commercial contracts of indebtedness in excess of $100,000.00. Instead, the enactment of R.C. 1301.21 to allow attorney fee provisions in certain contracts of indebtedness shows that the General Assembly recognized that otherwise, as argued by the Plaintiffs-Appellants herein, the common law would prohibit such clauses. Simply stated, there would be no need for the General Assembly to enact a statute allowing attorney fee provisions in certain types of contracts of indebtedness if, as the Defendants-Appellees argue, the common law already allowed them "in any context."

I. Allowing Attorney Fee Provisions In Mortgage Contracts Encourages Litigation

The Defendants-Appellees also seek to create the impression that a reinstatement is a mechanism that allows the parties to avoid litigation. In fact, of course, attorney fee provisions encourage litigation. Simply stated, if a lender directly contacts a defaulting borrower, and arranges for the borrower to, in effect, "reinstate" the mortgage by paying any late payments, plus interest and late charges, the lender is made whole, and the borrower keeps his or her home, without *anyone* having to incur legal fees. But, in that situation, the lender would have to absorb

any overhead/expenses associated with that effort to resolve the default, to the extent that any late charges are insufficient to cover that overhead.

If, on the other hand, the lender hires a lawyer to handle the default, and the lawyer first files a foreclosure action and then contacts the borrower (or waits for the borrower to contact it), then the borrower would be required to pay the attorney fees, thereby passing on to the borrower the overhead/expenses associated with the effort to resolve the dispute. In fact, although the Defendants-Appellees expressly[8] deny any financial incentive to file foreclosures, they implicitly admit that they do benefit financially:

> Attorneys' fee conditions in mortgage contracts ... make it economically feasible for a lender [to reinstate].

Defendants-Appellees' Brief, p. 27.

J. Disallowing Attorney Fee Provisions In Mortgages Will Not Allow A Borrower To Default On The Mortgage At No Risk

The Defendants-Appellees also attempt to convince this Court that invalidating the attorney fee provisions would allow a borrower to "default repeatedly [and] at no risk." Defendants-Appellees' Brief, p. 35. In fact, of course, if a borrower defaults, he or she will still owe the unpaid payments, plus interest and late charges, which, if not paid, will result in the loss of the home. Thus, a borrower cannot default at no cost or risk because, in order to reinstate, the borrower has to first pay any amounts that are past due, plus late charges.

K. Attorney Fee Provisions May Not Be Validated On The Ground That It Decreases A Party's Overhead

The Defendants-Appellees also complain that, if they cannot recover their attorney fees from the borrower, those expenses will increase its overhead, and, therefore, the price (interest

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[8] "[T]he possibility of receiving attorneys' fees ... is not the impetus for filing foreclosure proceedings...." Defendants-Appellees' Brief, p. 35.

rate) it will charge to lend money. Again, this argument proves too much, because it would apply with equal force to all contracts, such that, if that argument were endorsed by this Court, it would effectively transform Ohio into a "loser pays" jurisdiction.

L. The Defendants-Appellees' Reliance Upon Equitable Estoppel Is Misplaced And Premature

Finally, the Defendants-Appellees argue that the Plaintiffs-Appellants are equitably estopped from challenging the attorney fee provisions in their mortgage contracts. Simply stated, that issue, although raised below, was not addressed by the lower courts, and this Court's grant of jurisdiction was only over the legal issue whether Ohio law allows attorney fee provisions in residential mortgages. Should this Court agree with the Plaintiffs-Appellants that such provisions are not allowed under Ohio law, the Defendants-Appellees can then attempt to prove, in the lower courts upon remand, that the doctrine of equitable estoppel applies.

Further, the lower courts granted the Defendants-Appellees' Motions to Dismiss, which only tests the sufficiency of the allegations in the Complaint – not the substantive merits of an affirmative defense, such as equitable estoppel, and there have been no factual findings in this case, yet:

> We have held that equitable estoppel must be determined on the particular facts of each case. *Hampshire Cty. Trust Co. v. Stevenson* (1926), 114 Ohio St. 1, 11, 150 N.E. 726, 729.

In re Election of November 6, 1990 for Office of Attorney Gen. (1991), 58 Ohio St. 3d 103, 113. Thus, the decision of the lower courts should not be affirmed on the basis of the Defendants-Appellees' equitable estoppel affirmative defense.

III. REPLY TO "MERIT BRIEF OF APPELLEE WASHINGTON MUTUAL BANK"

A. The Plaintiff-Appellant Gulijk Was Required To Pay Attorney Fees As A Result Of Her Default

The Defendant-Appellee Washington Mutual Bank seeks to make much of the "fact" that the Plaintiff-Appellant Gulijk avoided foreclosure by renegotiating the terms of her mortgage, and that she thereby obtained a lower interest rate. This is not, however, what is alleged in the pleadings:

> 13. Plaintiff Marianne A. van Gulijk resides at 5090 Brush Ridge Court, Columbus, Ohio, a residence for which she is the title owner. On August 22, 1994 Marianne van Gulijk entered into a mortgage loan secured by her residence at 5090 Brush Ridge Court, Columbus, Ohio with the Defendant Homeside Lending, Inc, fka BancBoston Mortgage Corporation.
>
> * * *
>
> **I. Plaintiff Marianne van Gulijk**
>
> 58. On or about August 22, 1994, Plaintiff Marianne van Guilijk obtained a home mortgage loan from NBD Mortgage Company, which mortgage was subsequently assigned to the Defendant Homeside Lending, Inc., fka BancBoston Mortgage Corporation. This loan was secured by a recorded mortgage on her residence. A copy of the note and mortgage agreement are attached hereto as Exhibit 9.
>
> 59. In or about April of 1999, the Plaintiff began to fall behind on her mortgage payments. Defendant Homeside Lending, Inc. instituted collection proceedings against the Plaintiff, and on August 20, 1999 filed a Complaint in Foreclosure, demanding unpaid mortgage payments, interest, and costs.
>
> 60. At Plaintiff's request, a modification of the loan was negotiated with the "Terms of Modification" statement assessing "Legal fees and costs incurred in delinquency enforcement" of Nine Hundred Sixty Six Dollars ($966.00).
>
> 61. Plaintiffs paid the demanded amount that included the Nine Hundred Sixty Six Dollars ($966.00) as an attorneys' fee.

See Supplement, pp. 7-15. Thus, it is alleged that the Plaintiff-Appellant van Gulijk, like the other Plaintiffs-Appellants, was only able to avoid foreclosure of her residential mortgage, *i.e.*, stop the Defendant-Appellee's enforcement of her contract of indebtedness and keep her home, by paying the Defendant-Appellee's attorney fees, such that her claim, like the claim of the other Plaintiffs-Appellants herein, is within the scope of this Court's grant of jurisdiction.

The Defendant-Appellee Washington Mutual Bank, other than trying to convince this Court that its conduct is not encompassed within this Court's grant of jurisdiction, then repeats the substance of the arguments advanced by the other Defendants-Appellees. This Defendant-Appellee, however, like the other Defendants-Appellees, implicitly recognizes the validity of the Plaintiffs-Appellants' arguments.

B. The Defendant-Appellee Implicitly Admits That R.C. § 1301.21 Applies Herein

With regard to R.C. 1301.21, the Defendant-Appellee correctly recognizes that it forbids the recovery of attorney fees in connection with actions to "enforce" non-commercial contracts of indebtedness:

> R.C. 1301.21 is expressly limited to attorney fees that are awarded "in connection with the <u>enforcement</u> of a contract of indebtedness.

Defendant-Appellee's Brief, p. 17 (emphasis in original by Defendant-Appellee). The Defendant-Appellee then attempts to convince this Court that the fees it obtained were not "connected" to the "enforcement of a "contract of indebtedness." *Id.*

This argument, however, ignores the express language of the contractual provision at issue herein, which **only** allows the recovery of those attorney fees that were incurred in the "enforcement" of the "Security Agreement," *i.e.*, the fees incurred in seeking to enforce the mortgage:

> Borrower shall have the right to have **enforcement** of this Security Agreement [*i.e.*, the foreclosure action,] discontinued [if Borrower] pays all expenses incurred in **enforcing** this Security Agreement, including, but not limited to, reasonable attorneys' fees.... [Emphasis added.]

See typical reinstatement provision, quoted at ¶¶4-5 of the Court of Appeals' opinion, and Supplement p. 106.

The simple fact is that all of the Defendants-Appellees are requiring their borrowers to pay the attorney fees they incurred in connection with their attempts to enforce the mortgages, yet they acknowledge that Ohio law does not allow them to do so. It is for this reason that they make an attempt to have this Court, like the lower courts, base its decision on the fiction that a reinstatement has nothing to do with a foreclosure.

C. Disallowing The Attorney Fee Provision Will Not Allow Borrowers To Breach The Mortgage Contract With Impunity

The Defendant-Appellee Washington Mutual, like the other Defendants-Appellees, also attempts to convince this Court that disallowing the recovery of attorney fees would somehow give the borrower a free ride:

> Unless the lender is willing to incur unreimbursed attorney fees to pursue foreclosure proceedings that will ultimately be futile, the borrower would never need to make the monthly mortgage payments.

Brief of Defendant-Appellee, p. 2. This argument conveniently ignores the obvious fact that, to reinstate, *i.e.*, avoid foreclosure, the borrower has to make up any missed payments, plus interest and late charges. Thus, a borrower cannot simply stop making payments and then, when a foreclosure is filed, "reinstate" without any consequences – he or she will still have to bring the mortgage current, and pay late charges. If the borrower is unable to come up with the cash to bring the mortgage current, and to pay late charges, then the foreclosure can proceed.

D. The Enforcement Of The Attorney Fee Provision Would Allow Lenders To Avoid Usury Laws

The Defendant-Appellee Washington Mutual tries to distinguish the cases upon which the Plaintiffs-Appellants rely on the ground that, in those cases, the Court was concerned that allowing the recovery of attorney fees would, in effect, allow a lender to charge an interest rate in excess of that allowed by law:

> The common law rule discussed in *Leavans* [*v. Ohio National Bank (1893), 50 Ohio St. 591,*] prevents a lender from recovering its foreclosure fees ... because this would have effectively increased the interest rate....

Defendant-Appellee's Brief, p. 9. Although the Defendant-Appellee then asserts that this "rule has nothing to do with the facts of the present case," the other Defendants-Appellees, in their Brief, claim that, if they are not allowed to recover attorney fees, they will increase interest rates:[9]

> If a mortgage lender is not able to collect reasonable attorneys' fees, the lender will be more likely to ... increase the interest rate....

Brief of Defendants-Appellees Bank One, et al., p. 36. Thus, the Defendants-Appellees admit that they wish to use attorney fee recoveries to supplement the interest rate they charge.

It should be remembered, however, that the basic public policy justifying the common law rule, as expressed in *Miller*, which followed *Leavens*, was not the fact that they could be used to effectively charge an interest rate higher than that allowed by law, it was "the obvious tendency of such contracts to encourage suits." 85 Ohio St. at 192. Therefore, the concerns in *Leavens* and statement by Defendant-Appellee Washington Mutual were not – and today are not

[9] There is no evidence to support this contention.

– the primary reason for the common law's prohibition of attorney fee provisions in contracts of indebtedness.

E. Reinstatements Are In The Interest Of The Lender Regardless Whether They Can Recover Their Attorney Fees

The Defendant-Appellee Washington Mutual also raises the fear that, if lenders cannot recover their attorney fees, they will not offer reinstatements. In the first place, this ignores the fact that it is in the interest of the lender, not just the borrower, to avoid foreclosure, such that lenders will continue to offer reinstatements. The only thing that will change is that lenders will no longer automatically refer all defaults to a law firm that will run up legal fees and then add them to the amount the borrower has to pay to keep their home -- they will instead attempt to resolve such defaults directly with the borrower, and will only file foreclosures when it is apparent that the borrower simply cannot afford his or her home.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request this Court to reverse the decisions of the lower courts dismissing the Plaintiffs-Appellants' claims against the Defendants-Appellees, and to remand this case for further proceedings.

Respectfully submitted,

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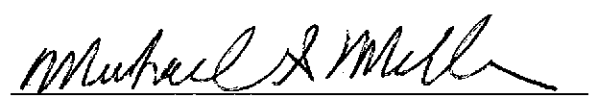

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APPENDIX

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Renuart, Williamson & Benson, FORECLOSURE PREVENTION COUNSELING -- Preserving the American Dream	A1

FORECLOSURE PREVENTION COUNSELING

Preserving the American Dream

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National Consumer Law Center

SCHEDULE OF STANDARD ATTORNEY FEES APPROVED BY HUD, FANNIE, and FREDDIE[14]

State	Most Common Method of Foreclosure	HUD	Fannie Mae	Freddie Mac
Alabama	Non-judicial	$600	$550	$500
Alaska	Non-judicial	$1,250	$1,200	$1,000
Arkansas	Non-judicial	$650	$600	$500
Arizona	Non-judicial	$675	$625	$500
California	Non-judicial	$650	$600	$500
Colorado	Non-judicial	$850	$800	$700
Connecticut	Strict Foreclosure	$1,350	$1,200	$1,450
Delaware	Judicial	$1,000	$950	$900
District of Columbia	Non-judicial	$650	$600	$750
Florida	Judicial	$1,250	$1,200	$950
Georgia	Non-judicial	$650	$600	$550
Guam	Judicial	$1,250	$1,200	$1,200
Hawaii	Judicial	$1,900	$1,000	$1,200
Idaho	Non-judicial	$650	$600	$500
Illinois	Judicial	$1,150	$1,100	$900
Indiana	Judicial	$1,050	$1,000	$900
Iowa	Judicial	$900	$850	$750
Kansas	Judicial	$900	$850	$750
Kentucky	Judicial	$1,150	$1,100	$1,000
Louisiana	Judicial	$950	$900	$1,050
Maine	Judicial	$1,300	$1,250	$1,500
Maryland	Non-judicial	$850	$800	$800
Massachusetts	Non-judicial	$1,300	$1,250	$1,200
Michigan	Non-judicial	$700	$650	$500
Minnesota	Non-judicial	$700	$650	$500
Mississippi	Non-judicial	$600	$550	$500
Missouri	Non-judicial	$700	$650	$600
Montana	Non-judicial	$650	$600	$750
Nebraska	Judicial	$900	$850	$750
Nevada	Non-judicial	$650	$600	$800
New Hampshire	Non-judicial	$950	$900	
New Jersey	Judicial	$1,350	$1,300	$750
New Mexico	Judicial	$950	$900	$750
New York	Judicial	$1,300	$800	$900
North Carolina	Non-judicial	$600	$550	$650
North Dakota	Judicial	$950	$900	$800
Ohio	Judicial	$1,150	$1,100	$900
Oklahoma	Judicial	$950	$900	$700
Oregon	Non-judicial	$725	$675	$600
Pennsylvania	Judicial	$1,300	$1,250	$1,000
Puerto Rico	Judicial	$1,150	$1,100	$750
Rhode Island	Non-judicial	$950	$900	$800
South Carolina	Judicial	$850	$800	$750
South Dakota	Non-judicial	$600	$550	$700
Tennessee	Non-judicial	$600	$550	$550
Texas	Non-judicial	$600	$550	$500
Utah	Non-judicial	$600	$600	$500
Vermont	Strict Foreclosure	$1,000	$950	$700/$1300[15]
Virginia	Non-judicial	$650	$600	$550
Virgin Islands	Non-judicial	$1,150	$1,100	$800
Washington	Non-judicial	$725	$675	$600
West Virginia	Non-judicial	$600	$550	$500
Wisconsin	Judicial	$1,150	$1,100	$1,000
Wyoming	Non-judicial	$650	$600	$700

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13. *See* Fannie Mae Single Family Servicer Guidelines, Part II, Chapter 6: Lender-Placed Property Insurance (Feb. 1, 2005).
14. Source: HUD Mortgagee Letter 05-30 and Fannie Mae and Freddie Mac servicing guides.
15. The higher attorney fee listed is for cases where there is equity in the property, thus requiring a foreclosure by judicial sale. Freddie Mac Single-Family Seller/Servicer Guide, vol. 2b, exh. 57a (Oct. 6, 2006).
16. 12 U.S.C. §§ 4901–4910.
17. Fannie Mae Single Family Servicer Guidelines, Part III, § 303: Properties Securing Delinquent Mortgages.
18. 12 U.S.C. § 2614.
19. 12 U.S.C. § 2605(f).
20. Remedies if the servicer simply fails to respond to the qualified written request are discussed in Chapter 6, above.
21. A summary of state servicing laws is contained in Appendix E of NCLC's *Foreclosures* (2d ed. 2007). While many of these statutes contain provisions similar to RESPA, some provide even greater rights to homeowners. State servicing laws that provide greater protections generally are not preempted.